United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

76-1504

76-1505

B P/S

United States Court of Appeals For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

ROGER L. SPINELLI and JOHN J. DELUCIA,

Appellants.

On Appeal From The United States District Court
For The District Of Connecticut

APPELLANTS' JOINT BRIEF

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STATUTES & AUTHORITIES

ISSUES PRESENTED

I DID THE DISTRICT COURT ERR IN DENYING APPELLANTS' MOTION TO DISMISS ON THE GROUND THAT THE GOVERNMENT WAS NOT READY FOR TRIAL WITHIN SIX MONTHS FROM THE DATE OF THEIR ARREST?

II DID THE DISTRICT COURT ERR IN DENYING APPELLANTS' MOTION TO SUPPRESS THE CONTENTS OF ANY INTERCEPTED WIRE COMMUNICATIONS, AND EVIDENCE DERIVED THEREFROM IN THAT:

A. The communications were unlawfully intercepted;

B. The application and order for wire interceptions were "insufficient on their face" in reciting that the authorizing official is an Acting Assistant Attorney General;

C. The interception application did not adequately show why traditional investigative techniques were not sufficient;

D. The court failed and refused to provide the Appellants with an evidentiary hearing, and/or an opportunity

to take depositions, in regard to the issue of who actually authorized the wire interceptions herein but rather it made the Appellants rely upon an unreliable affidavit of a convicted felon.

III DID THE DISTRICT COURT ERR IN DENYING APPELLANTS' MOTIONS TO SUPPRESS PHYSICAL EVIDENCE SEIZED UNDER 41 (f) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

INTRODUCTORY STATEMENT

On December 10, 1976, this matter was consolidated, pursuant to Rule 3(b) of the Rules of Appellate Procedure, with the appeals of William Balog, Nicholas Lanese and William Lanes, Docket Number 76-1504. With respect to issues II and III set forth on pages 1 and 2 of this brief, inasmuch as they are being briefed and argued by the Appellants in Docket Number 76-1504, the Appellants, ROGER L. SPINELLI and JOHN J. DELUCIA, pursuant to Rule 28(e) of the Rules of Appellate Procedure, hereby adopt by reference those portions of the Appellants' brief in Docket Number 76-1504 as pertain to those aforementioned issues.

Further, inasmuch as they have presented substantially identical motions and issues before the United States District Court, the Appellants, ROGER L. SPINELLI and JOHN J. DELUCIA, join in a single brief herein.

STATEMENT OF THE CASE

On December 17, 1971, the Federal Bureau of Investigation commenced a Court authorized interception of incoming and outgoing telephone calls at two separate apartments located in Bridgeport, Connecticut. (app. 223) These interceptions were authorized by District Judge M. Joseph Blumenfeld on December 16, 1971, upon submission of an application and affidavit to him by John R. Tarrant, a Special Attorney of the United States Department of Justice. (app. 196) The application on its face purported to have been authorized by Henry E. Peterson, Acting Assistant Attorney General of the Criminal Division of the United States Department of Justice. (app. 199) These interceptions continued for a period of four days and terminated on December 20, 1971. (app. 224)

On June 27, 1972, an indictment was filed in the United States District Court for the District of Connecticut charging the Appellants, ROGER L. SPINELLI and JOHN J. DELUCIA, and fourteen other defendants with a violation of Title 18 U.S.C. §§ 1955 and 2 alleged to have occurred from on or about December 17, 1971, to January 1, 1972. (app. 741)

After pretrial proceedings of over four years, on September 13, 1976, the Appellant, ROGER L. SPINELLI, entered a plea of nolo contendere to the charges set forth in the indictment. Upon a finding of guilty thereon by the court, the case was continued for sentencing. On October 12, 1976, judgment was imposed and it was the order of the court that the said Appellant be imprisoned for a period of one year; execution of sentence as to imprisonment to be suspended after three months and the Appellant was placed on probation for a period of two years. It was further ordered by the court that the Appellant was to pay a fine of Two Thousand ($2,000.00) Dollars within one year. (app. 788)

On September 13, 1976, the Appellant, JOHN J. DELUCIA, entered a plea of nolo contendere to the charges set forth in the indictment. Upon a finding of guilty thereon by the court, the case was continued for sentencing. On October 18, 1976, the court ordered the Appellant, JOHN J. DELUCIA, to be imprisoned for a period of one year; execution of sentence as to imprisonment was to be suspended after three months and Appellant was placed on probation for a period of two years. Appellant was further required to pay a fine of One Thousand ($1,000.00) Dollars within one year.

With the consent of the government and the approval of court, (Zampano, J.) the pleas of the Appellants, ROGER L. SPINELLI and JOHN J. DELUCIA, were entered upon the condition that the Appellants had preserved the issues presented herein for consideration on appeal by this court.[1] (app. 830-833)

Timely notice of appeals were filed on behalf of the Appellants, ROGER L. SPINELLI and JOHN J. DELUCIA. (app. 786, 787 a)

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[1] For authority for such procedure see United States v. Rothberg, 480 F2d 534, cert. denied, 414 U.S. 856, 94 S.Ct. 159, 38 L. Ed. 2d 106 (1973); United States v. Doyle, 348 F2d 715 (CA 2) cert. denied, 382 U.S. 843, 86 S. Ct. 89, 5 L. Ed. 2d 84 (1965); United States v. Faruolo, 506 F2d 490 (Cal. 1974).

STATEMENT OF FACTS

The Appellant, ROGER L. SPINELLI, was arrested on June 29, 1972. Referring to the docket sheet herein (app. 727-732), the following are the other relevant dates pertaining to said Appellant:

August 8, 1972	Motions for Bill of Particulars; to Inspect Grand Jury Minutes and to Extend Time within which to Move to Dismiss; for Discovery and Inspection; for Suppression of Evidence and for Severance.
September 25, 1972	Plea of not guilty entered (Newman, J.)
September 25, 1972	Hearing held on said Appellant's Motions for Bill of Particulars and for Discovery and Inspection - "DECISION RESERVED". All other motions deferred until one week after government complies with Discovery Motions (Newman, J.)
October 11, 1972	Appellant filed Amendments to Motion for Discovery & Inspection; Memorandum on Appellant's Motion for Discovery & Inspection; and Brief in Support of Appellant's Motion to Sever
October 24, 1972	Hearing held on Appellant's Amendments to Motion for Discovery & Inspection decision reserved in part; Motions for Inspection of Grand Jury Minutes; to Suppress and Return Evidence, for Severance; and to Dismiss - "OFF WITHOUT PREJUDICE" (Zampano, J.)
October 24, 1972	Appellant filed Supplemental Motion for Discovery and Inspection

March 6, 1973	Rulings filed on Appellant's Pretrial Motions for Discovery & Inspection, for Bill of Particulars, and for Motion for Extension of Time (14 day extension). All other motions - "OFF WITHOUT PREJUDICE"
June 29, 1973	Motions filed by Appellant for Discovery and Inspection and for Leave to Take Deposition
July 23, 1973	Hearing held with rulings (Zampano, J.) on Appellant's Motions for Discovery & Inspection and Motion for Leave to Take Deposition
November 12, 1973	Government's Motion to Stay the proceedings granted until United States Supreme Court decision in United States v. Giordano, 94 S. Ct. 1820 (1974) and United States v. Chavez, 94 S. Ct. 1849 (1974)
May 13, 1974	Giordano and Chavez decided by United States Supreme Court
May 28, 1974	"Notice of Readiness" filed by the government.

In computing the period the government was not ready for trial subsequent to his arrest, the Appellant, ROGER L. SPINELLI, claims the following periods of time:

PERIOD	DAYS
From June 29, 1972 (date of arrest) until August 8, 1972 (pretrial motions filed)	40
From March 20, 1973 (expiration of 14 day extension of time after rulings on pretrial motions on March 6, 1973) until June 29, 1973 (motions filed)	101
From July 23, 1973 (rulings on June 20, 1973 motions) until November 12, 1973 (proceedings stayed)	112
From May 13, 1974 (stay terminated) until May 28, 1974 ("Notice of Readiness" filed)	15
	268 days

The Appellant, JOHN J. DELUCIA, was arrested on June 29, 1976. Referring to the docket sheet herein (app. 727-732), the following are the other relevant dates pertaining to said Appellant:

July 24, 1972	Plea of Not Guilty entered (Clarie, J.)
August 14, 1972	Pretrial motions filed by defendant Varvella and applicable to DeLucia
March 6, 1973	Ruling on all pretrial motions. Those not ruled upon marked off without prejudice.

November 12, 1973	Government's motion to stay the proceedings until Supreme Court decision in Giordano and Chavez
May 13, 1974	Giordano and Chavez decided by Supreme Court

In computing the period the government was not ready for trial subsequent to his arrest, the Appellant, JOHN J. DELUCIA, claims the following periods of time:

PERIOD	DAYS
From June 29, 1972 (date of arrest) until August 14, 1972 (pretrial motions filed)	46
From March 20, 1973 (rulings on pretrial motions on March 6, 1973) until November 12, 1973 (proceeding stayed)	251
From May 13, 1973 (stay terminated) until May 16, 1973 (motion to dismiss filed)	3
	300

In addition, the Appellants asserted that the Government was not in fact ready for trial when it filed its Notice of Readiness on May 24, 1974, in that, thereafter, on January 8, 1975, the Government filed, as to all the defendants, a Motion

to Compel Voice Exemplars (app. 254). On March 15, 1976, that motion was granted, over objections.

On July 10, 1975, the Appellants, ROGER L. SPINELLI and JOHN J. DELUCIA, joined in a consolidated motion on behalf of all defendants to dismiss their indictments pursuant to the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, 28 U.S.C.A. App. (Supp. 1973), in that the Government was not ready for trial within six months from the date of their arrest (app. 259). That motion was denied by the Court (Zampano, J.) on March 15, 1976.

A R G U M E N T

I THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS ON THE GROUND THAT THE GOVERNMENT WAS NOT READY FOR TRIAL WITHIN SIX MONTHS FROM THE DATE OF THEIR ARREST.

The Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, hereinafter the Rules, 28 U.S.C.A. App. (Supp. 1973), were promulgated by the Circuit Council of the Second Circuit on January 5, 1971 (effective date July 5, 1971). On February 28, 1973, the judges of the United States District Court for the District of Connecticut, in accordance with Fed. R. Crim. p. 50 (b) and at the direction of the Circuit Court, approved and adopted a Plan for Achieving Prompt Disposition of Criminal Cases, hereinafter the Plan, and since April 1 of that year, the Rules have been effectively replaced by the Plan.

Rule 4 of the Plan provides that the government must be ready for trial six months "from the date of arrest, service of summons, detention or the filing of a complaint or a formal

charge ... whichever is earliest".[2] Here the Appellants, ROGER L. SPINELLI and JOHN J. DELUCIA, were first arrested on June 29, 1972, but the government did not file a "Notice of Readiness" until May 28, 1974, almost two years later.

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[2] 4. All Cases: Trial Readiness and Effect of Non-Compliance.

In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise, the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

This court may feel handicapped by lack of an explicit finding by the District Court in this matter. However, on March 15, 1976, the Court, upon the request of the Appellants to make such a finding (app. 271-281, 496-527), stated that "whoever reviews this case should review it on the cold record, because that's what /the appellants/ are entitled to" (app. 526). Consequently, the court is respectfully requested to review this issue on the "cold record" as set forth in the docket sheet (app. 727-732) in that the court adopted the docket sheet as its finding (app. 314). Based thereon, it is clear that for the Appellant, ROGER L. SPINELLI, 268 days expired between the date of his arrest and the date the government filed its Notice of Readiness. For the Appellant, JOHN J. DELUCIA, 300 days so expired.

Since the government failed to file a notice of readiness within six months from the dates of the Appellants' arrests, see United States v. Scafo, 480 F.2d 1312, at 1318 (2d Cir. 1973); United States v. Pierro, 478 F.2d 386, 388-89 (2d Cir. 1973), these indictments must be dismissed with prejudice, Hilbert v. Dooling, 476 F.2d 355, at 358 (2d Cir. 1973) (en banc), cert. denied, 414 U.S. 878, 94 S. Ct. 56, 38 L. Ed. 2d 123 (1973), unless enough of the time after the date of the Appellants' arrests

is properly excludable under Rule 5 of the Plan[3], or unless the government's neglect is otherwise excusable under Rule 4 of the Plan. See United States v. Flores, 501 F.2d 1356, 1359 (2d Cir. 1974); United States v. Bosques, 364 F. Supp. 131, 133 (D.C. Conn. 1973).

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[3] Text Rule 5

5. Excluded Periods.

In computing the time within which the government should be ready for trial under Rules 3 and 4, the following periods should be excluded:

(a) The period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pretrial motions, interlocutory appeals, trial of other charges, and the period during which such matters are sub judice.

(b) Periods of delay resulting from a continuance granted by the District Court at the request of, or with the consent of, the defendant or his counsel, in writing or stated upon the record. The District Court shall grant such a continuance only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges. A defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the court of his rights under these rules and the effect of his consent.

(c) The period of time during which:

(i) evidence material to the government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period; or

(ii) the prosecuting attorney is actively preparing the government's case for trial and additional time is justified by exceptional circumstances of the case.

(d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown. A defendant should be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence.

(e) A reasonable period of delay when the defendant is

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Text Rule 5 (continued)

joined for trial with a co-defendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.

(f) The period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.

(g) The period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

(h) Other period of delay occasioned by exceptional circumstances.

In argument in regard to the Appellants' Motion to Dismiss under Rule 4, the government contended (app. 773-779), in the alternatives, that the six months' rule was tolled under Rule 5 of the Plan for the following periods:

a. From the dates Appellants' motions to suppress were first filed, up through March 15, 1976;

b. From June 29, 1973, until November 12, 1973, in that during said period the government was attempting to comply with the court's orders for disclosure and production;

c. From August 30, 1973, until November 12, 1973, in that during said period a government motion for disclosure and production was pending;

d. The periods wherein a motion of any of the other defendants was pending in that the government claimed a motion on behalf of one defendant tolled the period as to all defendants;

e. From November 12, 1973, the date the stay of proceedings was entered, until January 20, 1975, when the court purportedly lifted the Stay; and/or

f. The period following May 28, 1974, the date it filed its Notice of Readiness.

Under the various alternatives set forth by it, the government conceded that, as to the Appellant, ROGER L. SPINELLI, it was chargeable with either 40, 120, 141, 158 or 179 days under the six months' rule (app. 779, 785).

The government further contended that if it was in compliance with the Plan as to Appellant ROGER L. SPINELLI, "then ... the government would be in compliance as to all defendants regardless of any individual computations that they might advance [4] (app. 779).

The Appellants each have conceded significant periods of time wherein the six months'rule was tolled under Rule 5 during the pendency of their pretrial motions and during the stay of proceedings. It is respectfully submitted that the arguments of the government in regard to the additional periods the six months' rule was tolled are facially erroneous and without merit.

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[4] In the event specific findings of fact on these issues are required by this court, it would be contended that each appellant must have his own findings under the six months' rule. However, in view of the fact that the district court adopted the "cold record" as its finding, the above contention of the government that the case of the Appellant, ROGER L. SPINELLI, controls the other defendants will not be contested herein.

A. APPELLANTS' MOTIONS TO SUPPRESS WERE NOT PENDING AFTER MARCH 20, 1973

The Appellants, ROGER L. SPINELLI and JOHN J. DELUCIA, first filed motions to suppress on August 8, 1972, and August 22, 1972, respectively. As previously indicated, those motions were marked "OFF WITHOUT PREJUDICE" on March 6, 1973. The government has contended that despite the fact the suppression motions were marked off, "the issue has been a mist which has enveloped all the proceedings since August 8, 1972, and the defendants defy logic by now claiming that the issue has not been pending".

Rule 5 of the Plan specifically states that the following periods should be excluded from the six-months period:

> "(a) The period of delay while proceedings concerning the defendant are pending, including ... proceedings for ... pre-trial motions ..., and the period during which such matters are sub judice."

Clearly, the Appellants' aforesaid motions for suppression were only pending until March 6, 1973, when they were marked off. At that point, there were no longer any pending proceedings in regard to the suppression motions, and they were no longer

"sub judice", or under judicial consideration. See Black's Law Dictionary, p. 1598 (4th Ed. 1968).

Rule 5 (a) does not exclude that period of time wherein a defendant contemplates filing a pretrial motion. For instance, in every criminal case it is a virtual certainty that the defendant will file some pretrial motion(s). Rule 5 does not exclude from the six months' rule the period of time of arrest until the time such contemplated motions are actually filed. Thus, the mere fact that after March 6, 1973, the Appellants may have contemplated filing another motion to suppress does not make such a motion pending. In addition, on July 23, 1973, the Court (Zampano, J.) acknowledged that the purpose of the defendants' discovery motions being considered that day were "so we can get a sufficient factual background to enable counsel to file his motion to dismiss and to suppress with enough underlying facts, which, at least in his opinion, support a grant of these motions." (emphasis added) (app. 676, 677) Certainly, if the suppression motions were pending as contended by the government, there would be no need to "file" them again as stated by the court. More importantly, on October 20, 1975, Judge Zampano specifically found that there "would be no motions pending as of the date when I stated that all motions were off". (app. 314) (emphasis added)

Finally, Rule 5 (a) concerns itself with the "period of delay" occasioned by pretrial motions. After March 6, 1973, until March 4, 1976, when the Appellants filed a second motion to suppress the wiretap interceptions, those motions were not pending before the court, there were no proceedings in regard to them, and they did not occasion any delay. Paraphrasing its own argument, the government defies logic by now claiming that the motion had been pending.

B. THE PERIOD WHEREIN THE GOVERNMENT IS ATTEMPTING TO COMPLY WITH COURT ORDERS FOR DISCLOSURE AND PRODUCTION IS NOT EXCLUDED FROM THE SIX MONTHS' RULE.

On June 29, 1973, the Appellant, ROGER L. SPINELLI, filed a Motion for Discovery and Inspection and For Leave to Take Depositions [5] (app. 764). On July 23, 1973, the court, in hearing such motions, ordered the government to secure an exemplar of Henry Peterson's signature, an exemplar of John Mitchell's initials, and a statement describing the appointment of ranking assistants within the office of the Assistant Attorney General for the Criminal Division (app. 674, 675). The government has contended that the period from June 29,

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[5] These motions were filed only by the Appellant, ROGER L. SPINELLI, and any proceeding in regard to them would not apply to the Appellant, JOHN J. DELUCIA.

1973, until November 12, 1973, wherein it was attempting to comply with the aforesaid court order, should be considered as a pending proceeding concerning the Appellant, ROGER L. SPINELLI, under Rule 5 (a) of the Plan and should not be charged against the government.

The court is asked to consider the following cases in regard to this subissue: United States v. Pollack, 474 F2d 828 (2nd Cir. 1973); United States v. Strayhorn, 471 F2d 661, 667 (2nd Cir. 1972); United States v. Gonzalez, 389 F Supp. 471, 475 (E.D. N.Y. 1975). Each of these dealt with the issue of whether the government had fully complied with defendant's discovery, and were thus ready for trial, within the six month period.

In United States v. Pollack, supra, the case was remanded to the District Court for further findings and one of the issues to have been developed on remand was a claim that the government had not complied with a discovery order and thus was not in fact ready for trial when it filed its notice of readiness. In United States v. Gonzalez, supra, the defendant contended that the filing of a notice of readiness was of no effect and, as

such, violated Rule 4 in that an outstanding bill of particulars had not been complied with by the government. The court, citing United States v. Strayhorn, supra at 667, said,

> "The Second Circuit has held that the six month rule is satisfied, as here, even when the completion of discovery follows the filing of a notice of readiness, as long as discovery has been completed within the six month period." (emphasis added)

Thus, if discovery is not completed by the government within the six month period, it indicates a lack of readiness for trial. The clear import of the above cases then is that the time wherein the government is complying with a discovery order is not an excluded period under Rule 5 (a) as claimed by the government.

C. THE PENDENCY OF THE GOVERNMENT'S MOTION FOR DISCLOSURE AND PRODUCTION DOES NOT TOLL THE SIX MONTHS' RULE.

The government has further contended that the period from August 30, 1973, the date it filed its Motion for Discovery and Inspection, until November 12, 1973, the date the stay was ordered, should also be considered as an excluded period during which proceeding concerning the Appellants were pending.

The Plan does not mandate trial within a certain time period, but instead aims to achieve its goal by concentrating on "prosecutorial delay as a means of implementing the public interest in disposition of criminal charges with reasonable dispatch." Hilbert v. Dooling, 476 F2d 355, 357 (2d Cir.) (en banc), cert. denied 414 U.S. 878, 94 S. Ct. 56, 38 L. Ed 2d 123 (1973).

Rule 4 (like Rule 4 of the Second Circuit Model Plan) is the heart of the scheme, requiring the government to "be ready for trial within six months from the date of arrest, service of summons, detention, or the filing of a complaint or formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest." See United States v. Furey, 514 F2d 1098 (2d Cir. 1975). Thus, the government must complete its pretrial preparations, including discovery, within that six month period.

However, the Plan also provides, under Rule 5, for the exclusion of certain periods from the six month limit. But, Rule 5 only relieves the government of responsibility for added delays "not within its control". (emphasis added) United States v. Furey, supra, at 1101.

Certainly any delay occasioned by the government's discovery motion is "within its control" and thus not excludable under Rule 5 as the government has claimed. Any other construction would subvert the purpose of Rule 5 in that, through discovery proceedings, the government could thereby extend the six month period indefinitely.

Furthermore, if the period wherein the government is complying with a defendant's request is not excluded from the six month period under Rule 5,(see Argument IB) it is difficult to conceive how Rule 5 would exclude the period wherein the government's discovery motions are pending.

D. A MOTION ON BEHALF OF ONE DEFENDANT DOES NOT TOLL THE SIX MONTH PERIOD AS TO ALL DEFENDANTS.

The government, in a brief to the District Court, claimed that "in a case involving more than one defendant (this case began with sixteen defendants), in which the defendants are properly joined for trial, the filing of motions on behalf of one defendant should toll the period as to all defendants" (app. 776). The government relied on Rule 5 (e) of the Plan to support such claim.

Rule 5 (e) of the Plan excludes the following from the six month period,

> "[A] reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and there is good cause for not granting a severance ..."

Before Rule 5 (e) becomes operative, there must be a "co-defendant as to whom the time for trial has not run". In its brief, the government is requested to designate as to which co-defendant(s) the time for trial had not run. It is respectfully submitted that, in fact, the six month period had run for each and every co-defendant herein.

Furthermore, even if, as a matter of law herein, a motion filed on benalf of one defendant tolled the six month period as to all defendants, as a matter of fact, the six month period would still have expired prior to May 28, 1974, when the notice of readiness was filed. Referring to the docket sheet herein (app. 728), the only other period of time wherein a motion was pending which was not encompassed within the periods the motions of the Appellant, ROGER L. SPINELLI, were pending is from July 18, 1972, until August 8, 1972, wherein certain motions of the Defendant, Piazza, were pending. Consequently, even if you

further exclude that period of 21 days, the Appellant, ROGER L. SPINELLI, would still have 247 days accrued under the six months' Rule. [6]

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[6] The Appellant, ROGER L. SPINELLI, has claimed 268 days under the six months' Rule. (See Statement of Facts, p. 7).

E. THE STAY OF PROCEEDINGS WAS TERMINATED ON MAY 13, 1974.

On June 8, 1973, the District Court granted the government's motion for a stay of proceedings which requested:

> "WHEREFORE, the undersigned respectfully move for a stay of proceedings in the above entitled case pending resolution in the Supreme Court of the United States of Giordano v. United States, C. C.A. 4, 1973), 469 F2d 522 and the matters thereto related."

Upon considering such motion, the Court (Zampano, J.) ruled, "the motion for stay shall be granted by agreement for the reasons stated in open court".

On May 13, 1974, the United States Supreme Court decided United States v. Giordano, 94 S. Ct. 1820 (1974) and United States v. Chavez, 94 S. Ct. 1849, (1974). The government acknowledged that the stay of proceedings was terminated on May 13, 1974, by a letter to Judge Zampano of the District Court dated October 18, 1974 which stated,

> "The Spinelli (H-299) and Balog (H-298) cases have been held in abeyance pending the decisions in Giordano and Chavez. The Supreme Court has ruled, and we feel the cases, based on the facts, fall under the Chavez decision. On this basis, we feel that the cases should now go forward ..." (app. 263)

The government thereafter contended that the stay was not automatically lifted on May 13, 1974.

If the stay had been entered to a date certain, i.e. May 13, 1974, certainly it would have terminated as of that date, without any court action. The fact that the date to which the stay was entered was fixed by an external standard, the date of the Supreme Court decision, does not change the fact that the stay terminated as of such date.

In fact, referring to the court docket sheet (app. 732), the activity in the case following May 13, 1974, indicates that everyone considered the stay lifted as of that date:

DATE	DOCKET ENTRY
May 16, 1974	Defendant DeLucia's Motion to Dismiss Indictment, filed
May 28, 1974	Notice of Readiness (for trial), filed by government
June 3, 1974	Government's Answer to Defendant's DeLucia's Motion to Dismiss Indictment, filed
August 26, 1974	Government's Motion to Dismiss Indictment re Defendant Albert Moretti, Sr., filed
September 3, 1974	Government's Motion to Dismiss granted by the court

October 4, 1974	Judge [illegible]pano appointed Richard L. [illegible]echt, Esq., as counsel for Defendant Phyllis [illegible]. Mahigel
Octobe. 22, 1974	Appearance of Richard L. [illegible]lbrecht, Esq., filed
November 18, 1974	Letter from Publi[illegible] Defender's Office requesting that appearance of Gregory B. Craig be entered for Defendant Varvella
December 9, 1974	Motion to Dismiss, togethere with memorandum, filed by Defendant, Conte
January 2, 1975	Government's response to Defendant Conte's Motion to Dismiss
January 8, 1975	Government's Motion to Compel Voice Exemplars, with memorandum.

F. THE GOVERNMENT WAS NOT READY FOR TRIAL WHEN IT FILED ITS NOTICE OF READINESS.

At the argument on the motion to dismiss before the District Court, the Appellants contended that the government was not in fact ready to proceed to trial when it filed its notice of readiness on May 28, 1974, in that it thereafter filed on January 8, 1975, as to all the defendants, a Motion to Compel Voice Exemplars (app. 280, 281). See United States v. Pollack, 474 F2d 828, 830 (2d Cir. 1973)

Unless the government was not, in fact, ready for trial on May 28, 1974, when it filed its notice of readiness, then why were voice exemplars requested?

The government has contended that its subsequent request for voice exemplars did not demonstrate that it was not ready for trial on May 28, 1974, when it filed it notice of readiness in that the voice exemplars would not delay a trial.

Under the government's contention, if the six month period, hypothetically, would expire on the first day of a given month, and trial was set for the last day of that month, it would thereby have an additional thirty days to be "ready for trial" under Rule 4. "Delay" of trial, however, is not the criteria. The government must be absolutely ready for trial at the end of the six month period; not just capable of being ready for trial, or almost ready for trial. This court acknowledged the fixed nature of the six months' Rule in United States v. McDonough, 504 F2d 67 (2d Cir. 1974) when it stated, at 68, 69, that:

> "...there is no de minimis time period under the six months' rule; the government 'must be ready for trial within six months ...', not six months and three days, four days, five days, or nine days. This has to be the case since we are

> dealing with a clear line of time -- much like a statute of limitations -- marked for prophylactic purposes, not to be analogized to the equitable doctrine of laches. There are any number of 'excluded periods' under Rule 5 of the Plan on which the Government may base a claim to toll the period, but the period itself is fixed, clearly, sharply and without qualification at six months."
> (emphasis added)

Further, before a voice exemplar should be ordered the government must make a "minimum showing" that the exemplar sought is (1) relevant and necessary to the particular criminal proceeding within which it is sought and (2) not sought primarily for another purpose. See In Re Grand Jury Proceedings, 486 F2d 85 (3rd Cir. 1973) (Schofield I); In Re Grand Jury Proceedings, 567 F2d 963 (3rd Cir. 1975) (Schofield II)

Though Schofield I and II dealt with Grand Jury proceedings, the court made it clear that the government has no general right to voice exemplars at any stage in the criminal proceedings.

Thus, the government, in effect, acknowledged the necessity and relevancy to its case of the voice exemplars when it requested them. Even if they may not have been crucial to its

case, as the government claimed, it seems preposterous to claim that they were not a part of its case. Clearly, on May 28, 1974, when it filed its notice of readiness, the government was missing a part of its case and was not, in fact, ready for trial.

The Appellants do not feel it is necessary for this matter to be remanded in view of Judge Zampano's indication that the cold record is, in fact, his findings and respectfully request that the indictment be dismissed.

However, in the event that this court does not adopt the request of the District Court (Zampano, J.) to review this matter "on the cold record because that's what [the appellants] are entitled to" (app. 526), it is respectfully suggested that this court should vacate the judgment and remand for further hearing on Appellant's motion to dismiss and for specific findings in regard thereto.[7] See United States v. Scafo, 470 F2d 748 (2d Cir. 1972); United States v. Pollack, 474 F2d 828 (2d Cir. 1973).

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[7] In United States v. Scafo, supra at 751, upon remand, this court directed the District Court, as follows:

"The district court should make findings of fact on the issues. If the district court finds, after taking such additional evidence as may be relevant, that the motion should be denied, it shall enter new final judgment based upon the record as supplemented by further testimony and findings, thereby preserving to the appellants his right to further appellate review.

On the other hand, if the motion is granted, the indictment should be dismissed."

CONCLUSION

Appellants respectfully ask this Court for the reasons stated herein, and for the reasons stated in Case #76-1504 which have been incorporated by reference, to reverse their convictions on the indictments herein and to order the indictment dismissed. In the alternative, the Appellants respectfully request this Court to reverse the conviction on the indictment herein and to order the District Court to hold an evidentiary hearing and to make findings in regard to the six months' Rule issues presented.

Respectfully Submitted

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STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 3 day of Jan., 1977 ~~1976~~ deponent served the within Brief upon

Hon. Peter Daucey

attorney(s) for

Appellee

in this action, at

270 Orange St., Room 310
P.O. Box 1824
New Haven, Connecticut

the address(es) designated by said attorney(s) for that purpose by depositing _____ copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 3 day
of Jan., ~~1977~~ , ~~1975~~.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978